

SERVICE DATE – JULY 10, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 752

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR RULEMAKING

Digest:<sup>1</sup> This decision waives the provision at 49 C.F.R. § 1110.2(d) and defers Board action on a petition to establish a rule requiring a cost-benefit analysis in certain future agency rulemakings.

Decided: July 8, 2019

On March 14, 2019, the Association of American Railroads (AAR) filed a petition to institute a rulemaking to adopt procedural rules that would require a cost-benefit analysis in certain Board rulemaking proceedings<sup>2</sup> and would set certain data requirements. In response to the petition, the Board received filings from the Competitive Enterprise Institute, the Western Coal Traffic League, the Joint Shippers,<sup>3</sup> the National Grain and Feed Association (NGFA), the American Forest & Paper Association, and the American Fuel & Petrochemical Manufacturers (AFPM).<sup>4</sup>

AAR contends that “agencies like the Board should ensure that they are incorporating meaningful cost-benefit analysis into their rulemakings.” (Pet. 5.) To that end, AAR proposes that the Board adopt three requirements: (1) that the Board consider the costs and benefits of new rules when it proposes and adopts such rules; (2) that the Board consider the cumulative

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Rulemakings described in 49 C.F.R. § 1110.3(a) (“[i]nterpretive rules, general statements of policy, and rules relating to organization, procedure, or practice”) would be excepted under AAR’s proposal on cost-benefit analysis. (See Pet. 22.)

<sup>3</sup> The Joint Shippers consist of the Agricultural Retailers Association, American Chemistry Council, American Malting Barley Association, Corn Refiners Association, Freight Rail Customer Alliance, Industrial Minerals Association—North America, Institute of Scrap Recycling Industries, Louisiana Chemical Association, National Association of Chemical Distributors, National Industrial Transportation League, Private Railcar Food and Beverage Association, The Chlorine Institute, The Fertilizer Institute, and the Vinyl Institute.

<sup>4</sup> AFPM seeks leave to late file its reply, which is not opposed. AFPM’s request will be granted in the interest of compiling a full and complete record.

impact of regulations; and (3) that the Board base its decisions on up-to-date and reliable data. (Id. at 2, 16, 21-22.)<sup>5</sup> AAR argues that similar reforms have been made at other agencies, such as the Securities and Exchange Commission, the Nuclear Regulatory Commission, the Department of Energy, the Department of Transportation, and the Federal Communications Commission. (Id. at 19-21). Several respondents replied in opposition to the petition noting, among other things, that most agencies have not adopted cost-benefit analysis policies by regulation, but rather by more informal means such as a policy statement or internal memorandum. (See, e.g., Joint Shippers Reply 5-6; NGFA Comment 1; AFPM Reply 3-4.) Joint Shippers and NGFA also stated, among other things, that the Board must consider resource needs and other factors that may limit its ability to conduct a meaningful cost-benefit analysis and that the Board must conduct an analysis consistent with its implementing statute. (Joint Shippers Reply 6, 8; NGFA Comment 2.)

AAR's petition and the responsive comments raise important issues of interest to the Board. Additional time is required for the Board to consider whether and how particular cost-benefit analysis approaches or data requirements might be more formally integrated into its rulemaking process. The Board also wishes to evaluate best practices of other agencies for conducting such analyses, including consideration of processes, methods, and other changes. Accordingly, the Board will waive the provision at 49 C.F.R. § 1110.2(d) and defer ruling on AAR's petition. No further public comment is required at this time.

It is ordered:

1. AFPM's request to late file its reply is granted.
2. A decision on AAR's petition to institute a rulemaking is deferred pending further order of the Board.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

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<sup>5</sup> The Board notes that it is unclear whether AAR believes the Board should consider cumulative impacts of a final rule "to the extent practicable," and whether AAR is suggesting that rules described in 49 C.F.R. § 1110.3(a) would be excepted from the proposed data requirements. (See Pet. 22, compare proposed § 1110.6(a) with proposed § 1110.6(b) and § 1110.9, respectively.)